A

NG SIEW LAN v. JOHN LEE TSUN VUI & ANOR

FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP FCJ
ABU SAMAH NORDIN FCJ
ZAHARAH IBRAHIM FCJ
B AZIAH ALI FCJ
ABDUL RAHMAN SEBLI JCA
[CIVIL APPEAL NO: 02(i)-76-11-2013(S) &
CIVIL APPLICATION NO: 08(F)-782-10-2012(S)]
4 JANUARY 2017

C

LEGAL PROFESSION: *Solicitors – Duty of care – First and second defendants acted for plaintiff in land transaction – Letter of disclaimer – Whether defendants entitled to rely on letter of disclaimer to absolve from liability and responsibility under sale and purchase agreement – Defendants' failure to disclose material facts*
D *to plaintiff at time of execution of letter of disclaimer – Whether incumbent on solicitor at time of execution of disclaimer to disclose facts which may affect client's decision – Whether letter of disclaimer void – Whether defendants in breach of contractual and fiduciary duties*

LEGAL PROFESSION: *Solicitors – Duty of care – First and second defendants*
E *acted for plaintiff in land transaction – Whether defendants acted for another party regarding same land at the same time – Whether conflict of interest arose – Whether defendants dishonest in dealings with plaintiff – Failure to apply for requisite permission to transfer land – Whether gross negligence on defendants' part – Failure to disclose material facts to plaintiff – Whether disentitled defendants from relying*
F *on letter of disclaimer absolving liability and responsibility – Whether letter of disclaimer void – Whether defendants in breach of contractual and fiduciary duties*

The plaintiff's claim against the first and second defendants was for a sum of RM600,000, being the amount she had paid for the purchase of a piece of land ('the land'). It was the plaintiff's case that she had lost the said amount
G through a deception scheme after placing her trust in the first defendant, a lawyer and partner in the second defendant law firm whom she had retained to act for her in the land transaction. Sometime in July 2003, the plaintiff and her business partner came to know of the land through two brokers and after inspecting the land, the plaintiff decided to purchase it and was told by
H the two brokers that the sale and purchase agreement would have to be prepared by the first defendant as the land title and the power of attorney ('PA') in respect of the land were kept by the first defendant. She was subsequently brought to meet the first defendant, who then showed her the original land title and PA in favour of the third defendant, giving the third
I defendant the right to deal with the land. The plaintiff then retained the first defendant for a fee to represent her in the sale and purchase transaction and to prepare all the necessary documentation. The plaintiff paid the purchase price of RM450,000 in full upon signing the sale and purchase agreement.

In early September 2003, the third defendant and the two brokers demanded an additional sum of RM150,000 for the purchase price of the land, which was to be paid to the third defendant, failing which the sale and purchase transaction would be cancelled. The plaintiff reluctantly agreed and paid the additional sum. To protect her interest, the plaintiff insisted that the land be transferred to her immediately and this was agreed to. The second defendant, through the first defendant, purportedly issued a letter to the land office, purporting to present, amongst others, the original memorandum of transfer and the original land title to effect transfer of the land to the plaintiff. However, despite the specific instructions given by the plaintiff to apply for permission to transfer, and despite the requirement for such permission from the authority, the first defendant did not make the application. Unbeknown to the plaintiff, sometime before 9 October 2003, and while they were still acting for her, the first and second defendants were also acting for a company called NCT Forwarding & Shipping (Sabah) Sdn Bhd ("NCT") which was desirous of buying the same land. On 14 October 2003, the plaintiff and the third defendant jointly signed a letter of disclaimer discharging the second defendant from 'all liabilities or responsibilities' under the sale and purchase agreement. However, a mere 17 days after the plaintiff signed the letter of disclaimer, and long after she had paid in full the purchase price of RM600,000, NCT deposited into the second defendant firm a sum of RM50,000 as deposit for the purchase price of five parcels of land, which included the land that the plaintiff had already purchased and paid for in full. The plaintiff thus never got the land and neither did she get back the RM600,000 she had paid. It was the first and second defendants' defence that they were entitled to rely on the letter of disclaimer to absolve themselves of all liability and responsibility under the sale and purchase agreement. The plaintiff, however, argued that the first and second defendants should not be allowed to rely on this letter of disclaimer to avoid liability as they had failed to disclose the following material facts to the plaintiff at the time she executed the letter of disclaimer (i) that while acting for the plaintiff, the first and second defendants had acted for NCT; and (ii) that the first and second defendants failed to apply to the land office for permission to transfer the land. After a full trial at the High Court, the plaintiff's claim was dismissed, on the principal ground that the first and second defendants had been discharged of all liability and responsibility under the sale and purchase agreement by the letter of disclaimer. The decision was further affirmed by the Court of Appeal. Hence, the present appeal herein. The question of law which leave to appeal had been granted for this court's determination was whether it was incumbent on the solicitor at the time of the execution of a disclaimer by his client to disclose the material facts which affect or may affect the decision of his client.

A B C D E F G H I

Held (allowing appeal with costs)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) The duty of a solicitor not to act in a position of conflict of interest is obvious. Where he is placed in that position, his basic duties include (i) to inform his client that he acts as a common solicitor for the parties in the transaction and the risk related thereto; and (ii) to advise the client to engage another solicitor to act for him in the transaction to avoid any conflict of interest between the parties. The first and second defendants had acted for NCT while still acting for the plaintiff; they had placed themselves in a situation of conflict of interest. There was no valid justification for compromising on the plaintiff's interest and to betray her trust. The first and second defendants should not have accepted any form of instruction from NCT in connection with the land, even if there was 'no concrete instruction' yet from NCT to buy the land, and that the instruction was 'merely to get a Xerox copy' of the land title, because by doing so, they had evinced a clear intention to act for NCT, which was detrimental to the plaintiff's interest. They should not be serving two masters at one time. (paras 60-64)

(2) Further, by making a land search it was patently clear that the first and second defendants had been acting in earnest for NCT. This was irrefutable proof that the first and second defendants had not been honest in their dealings with the plaintiff. That explained why they would not disclose to the plaintiff their involvement with NCT at the time she issued the letter of disclaimer. By suppressing this material fact from the plaintiff's knowledge, the first and second defendants had led the plaintiff into a false sense of belief that they were working earnestly to have the land transferred to her when in fact they were doing the exact opposite. The reason why the first and second defendants did not disclose this material fact to the plaintiff was because they had no desire for the land to be transferred to the plaintiff as their intention all along was for the land to be resold to another party, in this case NCT. (paras 67-69)

(3) The charade was obvious as the first and second defendants knew from the very beginning that the plaintiff had purchased the land, had paid the full purchase price totalling RM600,000 and they themselves claimed to have lodged the original land title and memorandum of transfer with the land office to effect transfer of the land to the plaintiff. For them to now act for another interested buyer and hide the fact from the plaintiff was clearly a breach of their duty of care and duty to act in good faith to the plaintiff. The first and second defendants' 'lack of forthrightness' in dealing with the plaintiff was compounded by their failure to apply for the requisite permission to transfer from the authority, the second material fact that they failed to disclose to the plaintiff. Given the first defendant's knowledge that the presentation would be rejected by the

land office without the application for permission to transfer, the reason behind the omission could only be to make sure that the land would not be transferred to the plaintiff. This was gross negligence. It was imperative for the first and second defendants to have disclosed this material fact to the plaintiff to enable her to make an informed decision whether or not to issue the letter of disclaimer. By deliberately withholding the two material facts from the plaintiff's knowledge, the first and second defendants were in clear breach of that duty. Silence is not an option. It is indicative of negligence and bad faith on their part. (paras 70-73)

(4) The first and second defendants' failure to disclose the two material facts to the plaintiff disentitled them from relying on the letter of disclaimer to absolve themselves of all liability and responsibility under the sale and purchase agreement. The fact that the plaintiff issued the letter of disclaimer voluntarily and with open eyes was of no consequence if material facts which affected or might have affected her decision to issue the letter of disclaimer were knowingly and deliberately withheld from her knowledge. For the court to countenance such action by the first and second defendants would be to condone their wrongful acts. They could not be allowed to benefit from their own wrong. It will be totally inequitable and contrary to conscience to allow them to do so. (paras 87 & 88)

(5) Such letter of disclaimer was void as the plaintiff was not made aware of the breaches by the first and second defendants when she terminated the retainer and promised to absolve the first and second defendants of their liability under the sale and purchase agreement. The first and second defendants had acted contrary to their duty by failing to advise the plaintiff to seek independent legal advice before she issued the letter of disclaimer and to make full disclosure of all material facts known to them. It was therefore wrong for the trial judge to have allowed the first and second defendants to rely on the letter of disclaimer to avoid liability. The answer to the question posed for determination was in the affirmative. (paras 89 & 90)

(6) Being the solicitors acting for the plaintiff in the land transaction, the first and second defendants owed her a duty not to injure her by failing to do that which they had undertaken to do, which was to take all necessary steps to effect transfer of the land to her upon execution of the sale and purchase agreement. The first defendant (and by the extension of the second defendant) had failed to discharge that duty in a manner that was expected of a reasonably competent solicitor having regard to the standards normally adopted in the profession. The first and second defendants were clearly in breach of their contractual and fiduciary

duties to the plaintiff. It tantamounts to misrepresentation by silence. They could not now take cover behind the letter of disclaimer and responsibility. The plaintiff's loss was caused directly by the first and second defendants' negligence. The plaintiff had thus discharged her burden of proving her claim against the first and second defendants on the balance of probabilities. (paras 94-100)

Bahasa Malaysia *Headnotes*

Tuntutan plaintif terhadap defendan pertama dan kedua adalah untuk jumlah RM600,000, iaitu jumlah yang telah dibayarnya bagi pembelian sebidang tanah ('tanah'). Adalah kes plaintif bahawa dia telah rugi jumlah tersebut melalui satu skim penipuan selepas meletakkan kepercayaannya kepada defendan pertama, seorang peguam dan rakan kongsi dalam firma undang-undang defendan kedua yang telah dikekalkan oleh plaintif untuk bertindak bagi pihaknya dalam transaksi tanah itu. Pada bulan Julai 2003, plaintif dan rakan perniagaannya telah diberitahu berkenaan sebidang tanah melalui dua broker dan selepas memeriksa tanah itu, plaintif membuat keputusan untuk membelinya dan dimaklumkan oleh dua broker tersebut bahawa perjanjian jual beli perlu disediakan oleh defendan pertama kerana hak milik tanah dan surat kuasa wakil ('PA') berkenaan tanah itu disimpan oleh defendan pertama. Plaintif kemudiannya telah dibawa untuk bertemu dengan defendan pertama, yang menunjukkan geran tanah asal dan PA memihak kepada defendan ketiga, memberikan hak kepada defendan ketiga untuk berurusan dengan tanah itu. Plaintif kemudiannya mengekalkan defendan pertama dengan bayaran fi untuk mewakilinya dalam transaksi jual beli dan untuk menyediakan semua dokumen yang diperlukan. Plaintif membayar harga belian RM450,000 sepenuhnya apabila menandatangani perjanjian jual beli. Pada awal bulan September 2003, defendan ketiga dan dua broker meminta bayaran tambahan RM150,000 untuk harga belian tanah itu, yang perlu dibayar kepada defendan ketiga, dan jika gagal transaksi jual beli akan dibatalkan. Plaintif bersetuju untuk membayar jumlah tambahan tersebut. Untuk melindungi kepentingannya, plaintif menegaskan supaya tanah itu dipindah milik kepadanya serta merta dan ini dipersetujui. Defendan kedua, melalui defendan pertama, dikatakan telah mengeluarkan surat kepada pejabat tanah, untuk menunjukkan, antara lain, memorandum pindah milik original dan geran tanah asal supaya tanah boleh dipindahkan kepada plaintif. Walaupun plaintif telah memberikan arahan secara spesifik untuk kebenaran memindah milik, dan walaupun keperluan untuk kebenaran daripada pihak berkuasa sepatutnya diperolehi, defendan pertama gagal membuat permohonan tersebut. Tanpa pengetahuan plaintif, sebelum 9 Oktober 2003, semasa defendan-defendan bertindak bagi pihak plaintif, defendan pertama dan kedua juga bertindak bagi sebuah syarikat NCT Forwarding & Shipping (Sabah) Sdn Bhd ('NCT') yang juga berminat membeli tanah yang sama. Pada 14 Oktober 2003, plaintif dan defendan ketiga bersama-sama menandatangani surat penafian melepaskan defendan kedua 'daripada semua

liabiliti dan tanggungjawab' di bawah perjanjian jual beli. Walau bagaimanapun, 17 hari selepas plaintif menandatangani surat penafian, dan selepas dia membayar harga belian penuh RM600,000, NCT mendepositkan ke dalam firma defendan kedua jumlah RM50,000 sebagai deposit untuk harga belian lima bidang tanah, termasuk tanah yang telah dibeli dan dibayar sepenuhnya oleh plaintif. Plaintif oleh itu tidak memperolehi tanah dan tidak mendapatkan balik jumlah RM600,000 yang telah dibayarnya. Pembelaan defendan pertama dan kedua adalah mereka berhak bergantung kepada surat penafian untuk membebaskan diri mereka daripada segala liabiliti dan tanggungjawab di bawah perjanjian jual beli. Plaintif, walau bagaimanapun, menghujahkan bahawa defendan pertama dan kedua tidak sepatutnya dibenarkan untuk bergantung kepada surat penafian bagi mengelakkan liabiliti kerana mereka gagal mendedahkan beberapa fakta material kepada plaintif semasa plaintif melaksanakan surat penafian (i) bahawa semasa bertindak untuk plaintif, defendan pertama dan kedua telah bertindak untuk NCT juga; dan (ii) bahawa defendan pertama dan kedua gagal memohon kepada pejabat tanah untuk kebenaran memindah milik tanah. Selepas perbicaraan penuh di Mahkamah Tinggi, tuntutan plaintif ditolak atas alasan utama bahawa defendan pertama dan kedua telah dilepaskan dari liabiliti dan tanggungjawab di bawah perjanjian jual beli melalui surat penafian itu. Keputusan tersebut turut disahkan oleh Mahkamah Rayuan. Oleh itu, rayuan ini. Kebenaran untuk merayu telah diberikan bagi persoalan undang-undang untuk penentuan mahkamah ini iaitu sama ada wajib untuk peguam semasa pelaksanaan surat penafian oleh anak guamannya untuk mendedahkan fakta-fakta material yang boleh menjejaskan keputusan anak guamannya.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Kewajipan peguam untuk tidak bertindak apabila berada dalam keadaan konflik kepentingan adalah jelas. Apabila dia berada di kedudukan itu, tugas asasnya termasuk (i) memaklumkan kepada anak guamannya bahawa dia bertindak sebagai peguam am bagi pihak-pihak dalam transaksi yang sama dan risiko yang berkaitan dengannya; dan (ii) untuk menasihati anak guamannya melantik peguam lain bertindak untuknya dalam transaksi bagi mengelakkan apa-apa konflik kepentingan antara pihak-pihak. Defendan pertama dan kedua telah bertindak untuk NCT ketika masih bertindak untuk plaintif, dengan itu mereka telah meletakkan diri mereka dalam situasi di mana konflik kepentingan wujud. Tiada justifikasi yang sah untuk menjejaskan kepentingan plaintif dan mengkhianati amanah yang telah diberikan olehnya. Defendan pertama dan kedua tidak sepatutnya menerima apa-apa bentuk arahan dari NCT berhubungan tanah itu, walaupun 'tiada arahan konkrit' dari NCT untuk membeli tanah, dan arahannya 'hanya untuk mendapat

A salinan Xerox' hak milik tanah, kerana dengan berbuat demikian, mereka telah memperlihatkan niat jelas untuk bertindak bagi pihak NCT, yang memudaratkan kepentingan plaintif. Mereka tidak sepatutnya berkhidmat dengan dua tuan pada satu masa.

B **(2)** Seterusnya, dengan menjalankan carian tanah, jelas bahawa defendan pertama dan kedua telah bertindak dengan bersungguh-sungguh untuk NCT. Ini adalah bukti yang tidak dapat disangkal bahawa defendan pertama dan kedua tidak jujur dalam urusan mereka dengan plaintif. Ini memperjelaskan mengapa mereka tidak mendedahkan kepada plaintif penglibatan mereka dengan NCT pada masa plaintif mengeluarkan surat
C penafian. Dengan menahan perkara ini daripada diketahui oleh plaintif, defendan pertama dan kedua telah membuatkan plaintif percaya bahawa mereka bekerja bersungguh-sungguh untuk tanah itu dipindah milik kepada plaintif tetapi sebenarnya mereka melakukan yang bertentangan. Alasan kenapa defendan pertama dan kedua tidak mendedahkan fakta
D material ini kepada plaintif adalah kerana mereka tidak ingin tanah itu dipindah milik kepada plaintif kerana niat mereka selama ini adalah untuk tanah itu dijual semula kepada pihak yang lain, dalam kes ini NCT.

(3) Sandiwara ini jelas kerana defendan pertama dan defendan kedua
E mengetahui dari awal lagi bahawa plaintif telah membeli tanah itu, membayar harga belian penuh berjumlah RM600,000 dan mereka sendiri mendakwa bahawa mereka telah mengemukakan geran asal tanah dan memorandum pindah milik dengan pejabat tanah untuk memindahkan tanah kepada plaintif. Untuk mereka sekarang bertindak
F bagi pihak pembeli lain yang berminat dan menyembunyikan fakta ini daripada plaintif adalah jelas satu pelanggaran kewajipan dan tanggungjawab mereka untuk bertindak dengan niat baik kepada plaintif. Kegagalan defendan pertama dan defendan kedua untuk berterus terang dalam urusan mereka dengan plaintif dikompaunkan lagi oleh kegagalan
G mereka memohon kebenaran yang diperlukan untuk pemindahan daripada pihak berkuasa, fakta material kedua yang gagal didedahkan kepada plaintif. Memandangkan defendan pertama mengetahui bahawa pembentangan akan ditolak oleh pejabat tanah tanpa memohon kebenaran memindah milik, sebab peninggalan tersebut hanya untuk memastikan tanah tidak akan dipindah milik kepada plaintif. Ini adalah
H kecuaian melampau. Adalah penting untuk defendan pertama dan kedua mendedahkan fakta material ini kepada plaintif bagi membolehkannya mencapai keputusan sama ada untuk mengeluarkan surat penafian. Apabila defendan pertama dan kedua dengan sengaja menyembunyikan kedua-dua fakta material itu dari pengetahuan plaintif, defendan pertama
I dan defendan kedua dengan jelasnya telah melanggar kewajipan mereka itu. Kesenyapan bukan satu pilihan. Ia menunjukkan kecuaian dan niat jahat mereka.

(4) Kegagalan defendan pertama dan defendan kedua mendedahkan dua fakta material kepada plaintif membuatkan mereka tiada hak untuk bergantung kepada surat penafian bagi melepaskan diri mereka dari segala liabiliti dan tanggungjawab di bawah perjanjian jual beli. Fakta bahawa plaintif telah mengeluarkan surat penafian secara rela hati dengan mata terbuka tidak membawa maksud apa-apa jika fakta material yang boleh atau mungkin menjejaskan keputusan plaintif untuk mengeluarkan surat penafian telah dengan sengaja disembunyikan dari pengetahuannya. Untuk mahkamah menunjukkan persetujuan dengan tindakan defendan pertama dan kedua adalah untuk menerima salah laku mereka. Mereka tidak dibenarkan mendapat manfaat daripada kesalahan mereka sendiri.

(5) Surat penafian terbatal kerana plaintif tidak diberitahu berkenaan pelanggaran-pelanggaran yang dilakukan oleh defendan pertama dan kedua apabila dia menamatkan penahan dan berjanji untuk melepaskan defendan pertama dan kedua dari liabiliti di bawah perjanjian jual beli. Defendan pertama dan kedua telah bertindak bertentangan dengan kewajipan mereka apabila gagal menasihati plaintif untuk mendapatkan nasihat undang-undang bebas sebelum dia mengeluarkan surat penafian dan untuk membuatkan pendedahan penuh semua fakta penting dalam pengetahuan mereka. Oleh itu, hakim bicara khilaf apabila membenarkan defendan pertama dan kedua bergantung kepada surat penafian bagi mengelakkan liabiliti. Jawapan kepada persoalan untuk penentuan dijawab secara afirmatif.

(6) Sebagai peguam-peguam yang bertindak untuk pihak plaintif dalam transaksi tanah itu, defendan pertama dan kedua bertanggungjawab untuk tidak merosakkannya dengan kegagalan melakukan kewajipan mereka, iaitu untuk mengambil beberapa langkah yang diperlukan untuk memindah milik tanah kepada plaintif semasa pelaksanaan perjanjian jual beli. Defendan pertama (dan secara lanjutan defendan kedua) gagal melepaskan tanggungjawab mereka dengan cara yang diharapkan oleh peguam yang berwibawa dengan mengambil kira standard yang biasanya dipakai dalam profesion ini. Defendan pertama dan kedua dengan jelasnya telah melanggar kewajipan kontrak dan fidusiari kepada plaintif. Ia membawa kepada misrepresentasi melalui kesenyapan. Mereka tidak boleh bersembunyi di sebalik surat penafian dan tanggungjawab. Kerugian yang dialami plaintif adalah disebabkan oleh kecuaian defendan pertama dan kedua. Oleh itu, plaintif telah melepaskan bebannya untuk membuktikan tuntutannya terhadap defendan pertama dan kedua atas imbangan kebarangkalian.

Case(s) referred to:

AEG Carapiet v. AY Derderian AIR 1961 Cal 359 ***(refd)***

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639 CA ***(refd)***

Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor [2005] 2 CLJ 713 FC ***(refd)***

Browne v. Dunn (1893) 6 R 67 ***(refd)***

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd [2004] 1 CLJ 357 CA ***(refd)***

Chow Yee Wah & Anor v. Choo Ah Pat [1978] 1 LNS 32 PC ***(refd)***

Clarke v. Edinburgh Tramways Co [1919] SC (HL) 35 ***(refd)***

Connecticut Fire Insurance Co v. Kavanagh [1892] AC 473 ***(refd)***

Datuk M Kayveas & Anor v. Bar Council [2013] 7 CLJ 533 FC ***(refd)***

Fardon v. Harcourt-Rivington (1932) 146 LT 391 ***(refd)***

Foo Fio Na v. Dr Soo Fook Mun & Anor [2007] 1 CLJ 229 FC ***(refd)***

Hj Ali Hj Othman v. Telekom Malaysia Bhd [2003] 3 CLJ 310 CA ***(refd)***

Kuan Pek Seng @ Alan Kuan v. Robert Doran & Ors And Other Appeals [2012] 1 LNS 775 CA ***(refd)***

Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***

Lee Chee Kiang v. Johnson Tan Teck Seng & Anor [2011] 9 CLJ 498 HC ***(refd)***

Letchemy Arumugam v. N Annamalay [1982] 1 LNS 8 ***(refd)***

Lim Geak Liang v. East West Umi Insurance Bhd [1997] 4 CLJ 405 FC ***(refd)***

Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (1) [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251 FC ***(refd)***

Midland Bank Trust v. Hett, Stubbs & Kemp [1978] 3 All ER 571 ***(refd)***

National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam) [2000] 1 CLJ 681 CA ***(refd)***

Ong Ban Chai & Ors v. Seah Siang Mong [1998] 3 CLJ 637 CA ***(refd)***

Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor [2009] 6 CLJ 430 FC ***(refd)***

Powell v. Streatham Manor Nursing Home [1935] AC 243 ***(refd)***

Prince Jefri Bolkiah v. KPMG (a firm) [1999] 1 All ER 517 ***(refd)***

Shayne Corey Cahill v. Kaka Singh Dhaliwal [2008] 3 CLJ 198 CA ***(refd)***

Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit Matusin & Ors [1994] 3 CLJ 567 SC ***(refd)***

Swamy v. Matthews & Anor [1967] 1 LNS 174 FC ***(refd)***

Tay Kheng Hong v. Heap Moh Steamship Co Ltd [1964] 1 LNS 202 HC ***(refd)***

Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd [2009] 6 CLJ 232 FC ***(refd)***

Watt (or Thomas) v. Thomas [1947] AC 484 ***(refd)***

Legislation referred to:

Land Ordinance (Sabah)(Cap 68), ss. 64, 97, 120

Other source(s) referred to:

Clerk & Lindsell on Torts, 18th edn, paras. 8-92

For the appellant - Colin Lau & Baldev Singh; M/s Baldev Gan & Assocs

For the respondents - Mau Kam Peng & Terrence Lee; M/s Lam & Co

[Editor's note: Appeal from Court of Appeal; Civil Appeal No: S-02(IM)-1734-2011 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli JCA:

Introduction

[1] The question of law for which leave to appeal had been granted for this court's determination is as follows:

> Whether it is incumbent on the solicitor at the time of the execution of a disclaimer by his client to disclose the material facts which affect or may affect the decision of his client.

[2] The issue concerns a solicitor's duty to disclose material facts to his client. We heard arguments on 11 May 2016 and reserved judgment to a date to be fixed. We have now reached a unanimous decision and this is our judgment. For convenience, we shall refer to the parties as they were in the High Court, namely the appellant as plaintiff and the first and second respondents as first and second defendants respectively. The suit against the third defendant was not pursued by the plaintiff as he could not be traced. He is not a party to this appeal.

The Plaintiff's Claim

[3] The plaintiff's claim against the first and second defendants was for a sum of RM600,000, being the amount she had paid for the purchase of a piece of land held under native title NT013084190 ("the land") measuring 4.25 acres more or less situated at Kampung Laut, Inanam, Sabah. Her case was that she lost the RM600,000 through a deception scheme after placing her trust in the first defendant, a lawyer and partner in the second defendant law firm whom she had retained to act for her in the land transaction. As it turned out, she never got the land and neither has she got back the RM600,000 purchase price that she had already paid for in full.

The Facts And Inferences From The Facts

[4] To put the matter in perspective, it is necessary to set out the facts in some detail. They are as follows. Sometime in July 2003, the plaintiff and her business partner were looking for a piece of land to relocate their automotive repair workshop. She came to know of the land through two brokers, one Yu Ah Kow and one Joseph Ling @ Marcus Ling.

[5] Yu Ah Kow was known to the first defendant as according to him he had dealings with this broker in his previous transactions "many years ago." Initially, the two brokers offered to sell the land at RM600,000 but the price was later agreed at RM450,000 with an option to buy back within four months at an increased price.

[6] After inspecting the land, the plaintiff decided to purchase it. She was told by the two brokers that the sale and purchase agreement would have to be prepared by the first defendant as the land title and the Power of Attorney

("PA") in respect of the land were kept by the first defendant. She was subsequently brought to meet the first defendant, who then showed her the original land title and a PA in favour of the third defendant giving the third defendant the right to deal with the land on behalf of the registered owner, one Datin Jikilin bte Majitan ("Datin Jikilin"). Although signed, the PA was undated and unstamped.

[7] The plaintiff then retained the first defendant for a fee to represent her in the sale and purchase transaction and to prepare all the necessary documentation. Pursuant to the retainer, the first defendant proceeded to draw up the sale and purchase agreement, which was executed on 29 July 2003 between the plaintiff and the third defendant as purported attorney of the landowner.

[8] The plaintiff paid the purchase price of RM450,000 in full upon signing the agreement. At the time she signed the agreement, the date written on the PA was 28 July 2003, ie, the previous day.

[9] Before the sale and purchase agreement was executed, the plaintiff noticed that the land title number that was written on the PA was different from the title number that was written on the title itself. She immediately alerted the first defendant to the discrepancy. The first defendant's response was to tell her that it was a typing error and that he would get it corrected. At the same time, the first defendant assured her that the PA was valid and that the third defendant was authorised to execute the sale and purchase agreement.

[10] In early September 2003, the third defendant and the two brokers demanded an additional sum of RM150,000 for the purchase price of the land, which was to be paid to the third defendant, failing which the sale and purchase transaction would be cancelled. The plaintiff reluctantly agreed and paid the additional sum of RM150,000 by two cheques, one dated 11 September 2003 in the sum of RM50,000 and the other dated 22 September 2003 in the sum of RM100,000. Again there was an option given to the plaintiff to buy back the land at an increased price within the same period of four months.

[11] It was the plaintiff's pleaded case that when she sought advice from the first defendant on the threatened repudiation of the sale and purchase agreement, the first defendant failed to advise her that she was entitled to reject the demand for the additional sum of RM150,000 and that the remedy of seeking an order for specific performance was available to her.

[12] At the trial the plaintiff's testimony was that when she sought advice from the first defendant, she was told by the first defendant that it was the third defendant's right to stop the transfer to her as the land had not been registered in her name. This is what she said in para. 16.3 of her witness statement:

> I then sought the advice of the 1st Defendant on the threatened breach. The 1st Defendant advised me that the 3rd Defendant could on his own withdraw from the sale of the said land and stop the transfer of the land to me. The 1st Defendant said the 3rd Defendant could do all those actions stated in paragraph 16.2 hereof as the said land have not been registered into my name yet.

[13] Despite the gravity of the allegation in the context of the claim against them, there was no serious challenge to the evidence by the first and second defendants in cross-examination. They were content with putting it to her in very general terms that she was "untruthful in all your evidence in your witness statement especially para. 7, para. 8.3, para. 9.2, para. 9.3, para. 9.4, para. 10, para. 16, para. 19 and para. 22." The plaintiff categorically denied the allegation.

[14] Despite putting it to the plaintiff that she was "untruthful in all your evidence in your witness statement", including in particular para. 16 (para. 16.3 in fact) where she mentioned the advice given, the first defendant did not adduce any evidence to contradict her. Nowhere in his evidence did he say that he did not give the advice. He merely said that there was no such threat by the third defendant to repudiate the sale and purchase agreement. But this is very different from saying that he did not in fact give the advice.

[15] The effect of failure by the first defendant to adduce such rebuttal evidence is that the plaintiff's evidence on this point remained uncontradicted and was the only version left for the court's consideration. It would be speculative in the circumstances for the court to accept any suggestion that the first defendant did not give such advise, when there was no such evidence before the court.

[16] What counsel put to an opposing witness in cross-examination, no matter how forcefully, is not evidence unless admitted by the witness. The cross-examination is merely to lay the groundwork for the party on whose behalf the question is put to establish the matter so put when his turn comes to give evidence.

[17] All payments, including payment for the additional purchase price of RM150,000, were paid directly to the third defendant through the first defendant. To protect her interest, the plaintiff insisted that the land be transferred to her immediately and this was agreed to. Thus, at the time of making the cheque payment of RM50,000 on 11 September 2003, she and the third defendant issued a letter to the second defendant, giving the following instructions to the law firm:

(i) To present the transfer documents to the land office for the purpose of transferring the land to the plaintiff, notwithstanding that the purchase price (the increased price) had not been paid in full; and

(ii) To apply to the authority for the necessary permission for the transfer of the land, which was necessary because of the express condition of the title.

[18] In purported compliance with the instructions, the second defendant through the first defendant purportedly issued a letter dated 15 September 2003 to the land office, purporting to present, amongst others, the original memorandum of transfer and the original land title to effect transfer of the land to the plaintiff.

[19] However, despite the specific instruction given by the plaintiff to apply for permission to transfer, and despite the requirement for such permission from the authority, the first defendant did not make the application. The implication of this omission is that even if it is true that the first defendant had presented the transfer documents to the land office, the presentation was doomed to fail because without the application for permission to transfer, the presentation was certain to be rejected by the land office. The first defendant cannot claim ignorance of this requirement as he had seven years experience as a conveyancing lawyer at the time.

[20] It does not therefore come as a surprise that the first defendant would later inform the plaintiff that the transfer documents including the original land title and the memorandum of transfer had gone missing at the land office. They were still missing at the time of the hearing of this appeal. Due to this turn of events, the plaintiff instructed the first defendant on 8 December 2003 to prepare a caveat for lodgment, which the first defendant admitted he did prepare.

[21] Unbeknown to the plaintiff, sometime before 9 October 2003 and while they were still acting for her, the first and second defendants were also acting for a company called NCT Forwarding & Shipping (Sabah) Sdn Bhd ("NCT") which was desirous of buying the same land. This fact was never disclosed to the plaintiff by the first and second defendants. It only came out during the trial in the cross-examination of the first defendant.

The Letter Of Disclaimer

[22] On 14 October 2003, the plaintiff and the third defendant jointly signed a letter of disclaimer discharging the second defendant from "all liabilities or responsibilities" under the sale and purchase agreement. We reproduce below the letter of disclaimer:

> NG SIEW LAN
> (NRIC NO. 680105-12-5232)
> Lot 29, Taman Kepayan Phase 1
> 88200 Kota Kinabalu
>
> And
>
> OMAR BIN SAFTURNI
> (NRIC NO. 631223-12-54431
> 4010, Taman Good Hope
> Jalan Sin On
> 91000 Tawau

Date: 14 October 2003

M/S Vincent Wong & Co.
Advocates & Solicitors
Suite 8.12, 8th Floor, Block A
Kompleks Karamunsing
88300 Kota Kinabalu

Dar (sic) Sirs,

Re: Sale and Purchase Agreement dated 29 July 2003
NT 013084190, Kota Kinabalu

We refer to the above and the Sale and Purchase Agreement dated 29 July 2003 prepared by your firm.

We confirm that we have entered into an agreement amongst ourselves and hereby discharge your firm from all liabilities or responsibilities under the above Sale and Purchase Agreement dated 29 July 2003 and hereby further relinquish all our rights towards any action, claim, demand, proceeding against your firm as a result of any loss or damages suffered by us with effect from the date hereof.

Yours faithfully,

Signed	Signed
(NG SIEW LAN)	(OMAR BIN SAFTURNI) (as attorney for JIKILIN BT MAJITAN)

[23] The plaintiff's testimony was that it was the first defendant who prepared and asked her to sign this letter of disclaimer. There was no challenge to this part of her evidence in cross-examination. It was never specifically put to her that the letter was not prepared by the first defendant. It must follow that the testimony given could not be disputed at all.

[24] Yet the first defendant in his evidence gave a completely different version. He alleged that it was the plaintiff herself who prepared the letter of disclaimer. This is what he said in para. 34 of his witness statement:

> 34. Refer to Bundle 2 at page 21. What is this document?
>
> - This is a document prepared by the Plaintiff and signed by the Plaintiff and the 3rd Defendant on the 14.10.2003 that the Plaintiff and the 3rd Defendant have made arrangement by themselves and thereby discharged the 2nd Defendant from all liabilities or responsibilities under the Sale and Purchase Agreement.

[25] The effect of failure to challenge the plaintiff's evidence on this point is to render the first defendant's version wholly untenable. This is settled law and the following pronouncement by Lord Halsbury in the House of Lords case of *Browne v. Dunn* [1893] 6 R 67 is relevant:

> To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an

A opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

[26] The same point was lucidly explained by Mukharji J in *A.E.G. Carapiet* B *v. AY Derderian* AIR 1961 Cal 359 in the following terms:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that the testimony given could not be disputed at all. **It is wrong to think that this is merely a technical rule** C **of evidence. It is a rule of essential justice.** It serves to prevent surprises at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is made comes to give evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much counsel is bound to do when cross-examining D that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or which that witness had any share. If he asked no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further E chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated. (emphasis added)

[27] The learned trial judge did not decide one way or the other on this material conflict of evidence but what is clear is that he did not reject the F plaintiff's evidence. He merely found her to be an intelligent person and "not one to sign any document without knowing the consequences." It was undoubtedly a finding that the letter of disclaimer was indeed prepared by the first defendant, except that the plaintiff knew the consequences of signing it.

G **Events Post Letter Of Disclaimer**

[28] Barely three days after the issuance of this letter of disclaimer, the transaction involving the land rapidly developed into a theatric of sorts. By letter dated 17 October 2003, a law firm called "Johari & Zelika" purporting to act for a Madam Cinulis @ Judy binti Satanis ("Madam Cinulis") wrote H to the second defendant asking for the second defendant firm to prepare a draft sale and purchase agreement for the sale and purchase of five parcels of land.

[29] Interestingly these five parcels of land included the land that the I plaintiff had already purchased and paid for in full. This time, however, the holder of the PA in respect of the land was not the third defendant but Madam Cinulis and the party intending to purchase the land was not the plaintiff but NCT.

[30] As for the part played by the third defendant in this later transaction, his role was to act as a broker and was to be paid RM100,000 by NCT for introducing the five parcels of land to them. So the protagonists in this conspiracy to defraud the plaintiff were the same except that some of them wore different hats.

[31] In cross-examination the first defendant confirmed that on 31 October 2003, which was a mere 17 days after the plaintiff signed the letter of disclaimer and long after she had paid in full the purchase price of RM600,000, NCT deposited into the second defendant firm a sum of RM50,000 as deposit for the purchase price of the five parcels of land.

[32] Thus, the proposed sale of the five parcels of land to NCT, which included the land already sold to the plaintiff, had indeed continued until sometime in December 2003, and this period coincided with the relodgment of the caveat on the land by the plaintiff on or about 8 December 2003.

[33] As to who Madam Cinulis was, it was suggested in cross-examination to Lawrensius @ Patrick Aloysius (PW3), the Senior Assistant Director of the Kota Kinabalu Lands & Surveys Department, that she was the land office clerk who received the second defendant's letter dated 15 September 2003 together with the original land title and memorandum of transfer. The purpose of the suggestion was of course to establish the fact that the first and second defendants had indeed presented the documents to the land office.

[34] PW3 categorically denied the suggestion. He said no such presentation was ever made to the land office. According to him, Madam Cinulis denied receiving the letter when he wrote to her for confirmation. The evidence further shows that even before the trial, the land office upon enquiry by the plaintiff's new firm of solicitors *vide* letter dated 8 January 2004 confirmed that they never received the letter and its enclosures. This was reaffirmed by PW3 in his witness statement during the trial when he said in answer to a question:

> Q: Please refer to Messrs Vincent Wong's letter dated 15.9.2003 at page 21 of Exhibit A. Were the transfer documents enumerated as (a) to (i) presented to the Land Office for registration?
>
> A: The Land Office had never received the said letter at page 21 of Exhibit A. I was the collector at the material time and I carried out an investigation and verified that those documents were never presented to the Land Office. No presentation number was ever issued by the Land Office for these documents.

[35] At the trial, it was put to the first defendant in cross-examination that he never made the application for permission to transfer. His answer was "I cannot recall". He gave a similar answer when it was next put to him that in early December 2003 he informed the plaintiff that all documents that he had forwarded to the land office had gone missing.

[36] This is a strange lapse of memory as it was his claim all along that he had presented the documents to the land office but that the documents had gone missing. In this regard, it is relevant to note that the first and second defendants failed to produce the presentation numbers that the land office would have issued if indeed there was such presentation of documents, as claimed by them.

[37] On 24 February 2004, the land office lodged a collector's caveat on the land upon complaint by Datin Jikilin that she never gave any PA to anyone to sell or to deal with the land. Furthermore, she was a bankrupt from 13 June 2000 until March 2008. The PA was, therefore, a forgery through and through.

[38] There is another aspect of the case that is relevant to the issue. During the negotiations for the sale of the land, the plaintiff had never met the registered landowner Datin Jikilin nor the bogus PA holder the third defendant. The negotiations were conducted between the plaintiff and the two brokers but in the presence of the first defendant most of the time.

[39] There is nothing unusual of course in the first defendant being present during the negotiations, given the fact that he was the lawyer acting for the plaintiff and that Yu Ah Kow was known to him. What is unusual however is his lack of interest in trying to find out who the third defendant really was, what was his connection with Datin Jikilin, and whether the PA he claimed to be holding was genuine. It would not have been much of an effort for him to do so.

[40] The fact that in Sabah unlike in Peninsular Malaysia there was no proper system of registration of PAs at the material time is a lame excuse for not exercising due diligence on such an important matter. After all land scams involving the use of forged documents was not something that was unheard of in Sabah. Surely, the danger of the PA being a forgery was not a fantastic possibility which would never occur to the mind of a reasonable man. In saying this, we are merely echoing what Lord Dunedin said in *Fardon v. Harcourt-Rivington* (1932) 146 LT 391 at p. 392 as follows:

> If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions … In other words, people must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities.

[41] Even the first and second defendants' own expert witness, Mr Christopher Chin Soo Yin (DW1) who had 20 years experience as a conveyancing lawyer in Sabah testified that he would treat PAs "with a great deal of caution". This is what he said in the following question and answer:

> What do you do when a prospective client comes to your office with a Power of Attorney and original land title to appoint you to act for the transfer of the land?
>
> a. I treat PAs with a great deal of caution. I generally would not accept the brief unless the attorney is a long standing client or well known to me.
>
> b. I would study not just the terms of the PA but also conduct searches on the land and a bankruptcy search on the donor concerned as well as look at the surrounding facts outside the PA. For example, I would enquire if there is an agreement for the sale of the land signed between the Donor and the Attorney which gave rise to the Power of Attorney or whether the title deed produced is a duplicate title deed certified under section 120 of the Land Ordinance (Cap 68).
>
> c. I would try to ascertain if there is any reason why the donor chose to appoint an attorney to deal with his/her land. For example it could be that the donor is going overseas for a period of time or the attorney has purchased the land which cannot be transferred at present.

[42] DW1 went on to testify that in order to satisfy himself as to the validity of the PA, he would look, amongst others, for the following:

(i) Formalities in relation to dating, sealing and stamping;

(ii) Proper description of the subject land;

(iii) Who drafted the PA;

(iv) The relationship between the donor and the attorney;

(v) Why was the PA given;

(vi) Attestation under s. 97 of the Land Ordinance;

(vii) If the PA relates to a native title, then is the attorney also a native under s. 64 of the Land Ordinance;

(viii) Capacity of the parties;

(ix) Why did the donor give the PA;

(x) Whether the intended transaction is allowed in the PA;

(xi) Whether the PA is gratuitous or is a PA where the attorney has an interest in the land;

(xii) Whether the PA contains the power to carry out the intended dealing;

A (xiii) Does the attorney have possession of the original title deed as opposed to a certified title under s. 120 of the Land Ordinance;

(xiv) The noting of the PA with the land office;

(xv) Whether the original copy of the PA is produced.

B **[43]** It is a long checklist. If by adducing this evidence the first and second defendants' intention was to show that the first defendant had followed the checklist strictly, then they have not explained how the forged PA could have slipped through the first defendant's fingers so easily. It is obvious that he did not treat the PA "with a great deal of caution" as he should have. In C cross-examination, he admitted that he did not know Datin Jikilin, never met her, and never acted for her before. In other words, she was a total stranger to him.

[44] Such being the case, the possibility of danger emerging was "reasonably apparent" and not "a mere possibility which would never occur D to the mind of a reasonable man": *Fardon v. Harcourt-Rivington (supra)*. The first defendant was therefore under an obligation to be especially careful. Yet he took no extra precaution before acting on the PA although the third defendant (the purported attorney) was not a long standing client or well known to him. In fact, he did quite the opposite by assuring the plaintiff that E the PA was valid and that the third defendant was authorised to execute the sale and purchase agreement, which was proven to be a sham.

[45] Likewise, with due diligence the first defendant would have discovered that Datin Jikilin was a bankrupt and therefore had no standing to grant the PA to the third defendant giving him the authority to sell the F land. At the trial the first defendant candidly admitted in cross-examination that he never contacted Datin Jikilin to verify if she had signed the PA or had authorised the third defendant to sell the land.

[46] It would not have been unduly difficult for the first defendant to contact Datin Jikilin, if the plaintiff's effort at doing so is anything to go by. G Apparently, she had no difficulty in contacting her. This is what she said in her evidence, which also went unchallenged:

> Furthermore on the 12.1.2004 I contacted the registered owner and upon enquiry from her discovered that she had never granted the purported PA to the 3rd Defendant and that her alleged signature in the purported PA H was forged. Subsequently on or about 15.1.2004 the registered owner lodged a Police report denying the executing any or the purported PA to the 3rd Defendant, and on or about the 21.1.2004 the registered owner lodged another Police report on the loss of the document of title to the said land.

I **[47]** It cannot be a valid point for the first and second defendants to argue, which the learned trial judge accepted, that since all the parties had no knowledge of Datin Jikilin's bankruptcy at the material time, the first

defendant had no duty to make a search prior to the release of the full purchase price. That would only be a valid point if the bankruptcy could not possibly have been discovered with due diligence.

[48] But here the situation facing the first and second defendants obviously necessitated a search. Thus the reason given by DW1 that the bankruptcy search result would take a long time to receive from the authorities is not a valid excuse for putting the plaintiff's interest on the line.

[49] It is pertinent to note that when cross-examining the plaintiff on the PA, it was put to her by learned counsel for the first and second defendants that she personally met Datin Jikilin before 28 September 2003 and that Datin Jikilin herself signed the PA. Counsel probably meant 28 July 2003 as that was the date written on the PA, and not 28 September 2003. The plaintiff disagreed. This is a very serious assertion of fact made against the plaintiff. It implied that it was she herself who obtained Datin Jikilin's signature on the PA.

[50] Now, 'putting' to a witness an allegation of fact which constitutes a crucial part of the defence case is to put the witness to notice that evidence will be led to prove the allegation. Of course, if the witness admits to the question put, the fact is proved. Otherwise, evidence must be led to prove the allegation. In the present case, when the first and second defendants' turn came to give evidence, not a shred of evidence was produced to substantiate the allegation, much like their failure to produce evidence with respect to the issue we discussed in paras. 14-16 above.

[51] What was put to the plaintiff must therefore be taken as a baseless allegation. This goes to the credibility of the defence case as what counsel put to the plaintiff must be taken to be on the instruction of the first and second defendants (counsel do not go on a frolic of their own in putting their clients' side of the story to the opposing witnesses).

[52] But the truth is, it was not the first and second defendants' pleaded case that the plaintiff had brought a signed PA to their office for the purpose of executing the sale and purchase agreement. Nor was it put to the plaintiff in cross-examination: *Browne v. Dunn; AEG Carapiet v. Derderian* (*supra* at paras. 25 and 26).

The High Court And Court Of Appeal Decisions

[53] After a full trial of the action, the Kota Kinabalu High Court dismissed the plaintiff's claim, on the principal ground that the first and second defendants had been discharged of all liability and responsibility under the sale and purchase agreement by the letter of disclaimer dated 14 October 2003.

[54] In the alternative it was decided by the learned trial judge that even if the letter of disclaimer did not discharge the first and second defendants of liability and responsibility under the sale and purchase agreement, the first

A and second defendants had not breached their duty of care to the plaintiff. The plaintiff appealed against the decision but the decision was affirmed by the Court of Appeal, hence the present appeal before us.

The Arguments And Our Assessment

B **[55]** The key question that calls for consideration is whether the first and second defendants were entitled to rely on the letter of disclaimer to absolve themselves of all liability and responsibility under the sale and purchase agreement, as claimed by them. There is no doubt as to the importance of this letter of disclaimer, which formed the backbone of the first and second defendants' defence.

C

[56] The plaintiff's argument is that the first and second defendants should not be allowed to rely on this letter of disclaimer to avoid liability as they had failed to disclose the following material facts to the plaintiff at the time she executed the letter of disclaimer:

D (i) That while acting for the plaintiff in the land transaction, the first and second defendants had, at the same time, acted for NCT which was also desirous of buying the land;

(ii) That despite being instructed in writing by the plaintiff to apply to the land office for permission to transfer the land as required by the special condition of the land, the first and second defendants failed to do so.

E

[57] The fact that the first and second defendants did not disclose these two material facts to the plaintiff is not in dispute. The first material fact raises the issue of conflict of interest whilst the second is loaded with the question as to why the first and second defendants did not comply with the plaintiff's written instruction to apply for permission from the authority to transfer the land.

F

[58] The main thrust of the plaintiff's argument is that both the High Court and the Court of Appeal failed to consider or judicially appreciate that the first and second defendants' failure to disclose these material facts to the plaintiff shows that they never intended for the sale of the land to go through and that the purchase was a charade to induce the plaintiff to part with her money. It is a grave allegation that impinges on the first and second defendants' honesty and integrity as solicitor and law firm respectively.

G

H **[59]** It was submitted that the non-disclosure of these material facts had impacted on the plaintiff's decision to issue the letter of disclaimer. The suggestion of course is that she would not have issued the letter of disclaimer had she been appraised of these material facts by the first and second defendants.

I **[60]** The duty of a solicitor not to act in a position of conflict of interest is obvious. Where he is placed in that position, his basic duties include: (i) to inform his client that he acts as a common solicitor for the parties in

the transaction and the risk related thereto and; (ii) to advise the client to engage another solicitor to act for him in the transaction to avoid any conflict of interest between the parties: See *Lee Chee Kiang v. Johnson Tan Teck Seng & Anor* [2011] 9 CLJ 498, a decision by David Wong Dak Wah J (as he then was).

[61] The learned authors of *Clerk & Lindsell on Torts* (18th edn) have this to say on such conflicts of interest at paras. 8-92:

> **Conflicts of interest** A lawyer owes a duty to his client not to act for another in a situation where there would be a potential conflict of interest. If such a situation arises, he must decline to act for one or the other. Such a conflict will invariably arise where one firm of solicitors represents the two parties on opposite sides in litigation. In other situations, or where a firm of solicitors has previously acted for one party and now wishes to act for another whose interests are opposed, there will be a breach of duty unless it is absolutely clear that there can be no leakage or misuse, deliberate or otherwise, of confidential information …

[62] In the House of Lords case of *Prince Jefri Bolkiah v. KPMG (a firm)* [1999] 1 All ER 517 Lord Millet whose judgment found favour with the other four law Lords said this at p. 526:

> My Lords, I would affirm this as a basis of the court's jurisdiction to intervene on behalf of a former client. It is otherwise where the court's intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients to act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation.

[63] There can be no argument that when the first and second defendants acted for NCT while still acting for the plaintiff, they had placed themselves in a situation of conflict of interest. The first defendant was asked during cross-examination why he did not disclose this conflict of interest to the plaintiff. His answer was that there was "no concrete instruction" yet from NCT to purchase the land and that his instruction from NCT at that time was "merely to get Xerox copy, no firm decision was taken whether to buy or not".

[64] We can say at once that this is not a valid justification for compromising on the plaintiff's interest and to betray her trust. The first and second defendants should not have accepted any form of instruction from NCT in connection with the land, even if there was "no concrete instruction" yet from NCT to buy the land and that the instruction was "merely to get a Xerox copy" of the land title, because by doing so they had evinced a clear intention to act for NCT, which was detrimental to the plaintiff's interest. They should not be serving two masters at one time.

[65] The first defendant was not even telling the truth when he said that his instruction from NCT was "merely to get Xerox copy" of the land title. The evidence shows that five days before the letter of disclaimer was issued by the plaintiff, which was about three weeks after she paid the increased purchase price of RM600,000 in full (the last payment being on 22 September 2003 for the sum of RM100,000), the first and second defendants carried out a land title search for NCT.

[66] This was confirmed by the first defendant himself when he admitted in cross-examination that on 9 October 2003 he had already started making a land search for the subject land. This contradicted his earlier answer that he only acted for NCT after the second defendant had been discharged from acting for the plaintiff by the letter of disclaimer, which was on 14 October 2003. With due respect, for a lawyer of his experience to contradict himself so materially on such a material issue does not speak well of his trustworthiness as a witness.

[67] By making the land search, it is patently clear that the first and second defendants had been acting in earnest for NCT and not "merely to get Xerox copy" of the land title. This is irrefutable proof that the first and second defendants had not been honest in their dealings with the plaintiff. That explains why they would not disclose to the plaintiff their involvement with NCT at the time she issued the letter of disclaimer.

[68] By suppressing this material fact from the plaintiff's knowledge, the first and second defendants had led the plaintiff into a false sense of belief that they were working earnestly to have the land transferred to her when in fact they were doing the exact opposite.

[69] Having regard to the totality of the evidence and the probabilities of the case, we are inclined to agree with learned counsel for the plaintiff that the reason why the first and second defendants did not disclose this material fact to the plaintiff was because they had no desire for the land to be transferred to the plaintiff as their intention all along was for the land to be resold to another party, in this case NCT.

[70] The charade is obvious as the first and second defendants knew from the very beginning that the plaintiff had purchased the land, had paid the purchase price in full totalling RM600,000, and they themselves claimed to have lodged the original land title and memorandum of transfer with the land office to effect transfer of the land to the plaintiff. For them to now act for another interested buyer and hide the fact from the plaintiff was clearly a breach of their duty of care and duty to act in good faith to the plaintiff.

[71] The first and second defendants' lack of forthrightness in dealing with the plaintiff is compounded by their failure to apply for the requisite permission to transfer from the authority, the second material fact that they failed to disclose to the plaintiff. Given the first defendant's knowledge that the presentation would be rejected by the land office without the application

for permission to transfer, the reason behind the omission could only be to make sure that the land would not be transferred to the plaintiff. This is negligence.

[72] Obviously the plaintiff did not know that the first and second defendants did not comply with her instruction to apply for the permission to transfer. Under the circumstances, it was imperative for the first and second defendants to have disclosed this material fact to the plaintiff to enable her to make an informed decision whether or not to issue the letter of disclaimer.

[73] It needs no emphasis that a solicitor's duty is to protect his client's interest and not to undermine it. His client places in him the full trust and confidence to do the right thing to safeguard his interest. By deliberately withholding the two material facts from the plaintiff's knowledge, the first and second defendants were in clear breach of that duty. Silence is not an option. It is indicative of negligence and bad faith on their part.

The First And Second Defendants' Position

[74] Essentially the first and second defendants' opposition to the plaintiff's appeal is grounded on a pleading point. Their point of contention is that the issue of non-disclosure of material facts was not pleaded, not part of the agreed issues, not admitted, and "not proved on any standard of proof". It was submitted that in the circumstances there is no material for the exercise of discretion to permit the new point raised.

[75] The following authorities were cited in support of the argument: *Browne v. Dunn (supra)*; *Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639; *A.E.G. Carapiet v. Derderian (supra)*; *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd* [2004] 1 CLJ 357; *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232; *Datuk M Kayveas & Anor v. Bar Council* [2013] 7 CLJ 533; *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 6 CLJ 430; *Kuan Pek Seng @ Alan Kuan v. Robert Doran & Ors And Other Appeals* [2012] 1 LNS 775; *Lim Geak Liang v. East West Umi Insurance Bhd* [1997] 4 CLJ 405; *Hj Ali Hj Othman v. Telekom Malaysia Bhd* [2003] 3 CLJ 310; *Connecticut Fire Insurance Co v. Kavanagh* [1892] AC 473.

[76] In amplification, it was argued that the plaintiff is seeking to sustain the appeal by fishing out a cause of action which was not presented at the trial and on which a verdict was not asked for and upon which damages had unquestionably been refused. It was therefore urged upon us that the answer to the question of law posed for determination ought not to be in favour of the plaintiff, for the following reasons:

(a) The question of law posed is dependent on a finding of fact of non-disclosure or suppression of fact;

A (b) It is a question of fact of which only the trial judge could make a finding;

(c) Non-disclosure or suppression is a most damning allegation going to character and involves allegation of fraudulent intent;

(d) The fact of non-disclosure or suppression was never in evidence;

B (e) The plaintiff never even put the question of non-disclosure or suppression to the first or second defendant's witnesses;

(f) Non-disclosure or suppression, the substratum for the question, is entirely speculative.

C **[77]** The plaintiff's answer to the contention is that the leave question involves a question of law on facts that were already fully led in evidence at the trial and argued both in the High Court and in the Court of Appeal. It was pointed out that in the Court of Appeal, one of the arguments put forward by the first and second defendants was that "no reasonable person D would in similar circumstances as on our fact sign such alleged release to absolutely exonerate the defendants from the above many grave and serious breaches of the said duty".

[78] The argument had indeed been raised by the first and second defendants in the Court of Appeal. On our part, we consider it to be an E indirect admission by the first and second defendants that if not for the letter of disclaimer, they would be liable for the "many grave and serious breaches of the said duty".

[79] It was further submitted by learned counsel for the plaintiff that the question for determination is not a radical departure from the defence argued F in the High Court and in the Court of Appeal but a mere development of the defence based on the same facts. The following authorities were cited in support: *Shayne Corey Cahill v. Kaka Singh Dhaliwal* [2008] 3 CLJ 198; [2008] 2 MLJ 709; *Lim Geak Liang (supra)*; *Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor* [2005] 2 CLJ 713; [2005] 3 MLJ 681; *National* G *Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam)* [2000] 1 CLJ 681; [2000] 2 MLJ 144; *Superintendent of Lands and Surveys; 4th Division & Anor v. Hamit Matusin & Ors* [1994] 3 CLJ 567; [1994] 3 MLJ 185.

[80] We have gone through the record of appeal carefully and we agree that evidence relating to the issues of conflict of interest, the letter of disclaimer, H and the failure to apply for permission to transfer had extensively been led by both parties at the trial, as can be seen at CB2 pp. 208-213, 221, 223-224 (conflict of interest), CB2 pp. 168, 177, 182, 195, 206, 207 (letter of disclaimer), and CB2 pp. 165, 176, 195, 202, 206 (permission to transfer).

I **[81]** Most importantly, the fact of non-disclosure of the material facts is not in dispute. It is therefore incorrect to say that the question of law posed for determination is dependent on a finding of fact which only the trial judge could make. The question is a pure question of law which could be determined by reference to the undisputed fact.

[82] The law of course is settled that an appellate court should be slow to interfere with findings of fact made by the court of first instance to which the law entrusts the primary task of evaluating the evidence presented before it. The law reports are replete with high authorities for this trite proposition of law. Suffice it if we refer to the decision of the Judicial Committee of the Privy Council in *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; [1978] 2 MLJ 41, a case emanating from Malaysia where Lord Fraser of Tullybelton delivering the judgment of the Judicial Committee cited with approval the following authorities which dealt with the same issue: *Watt (or Thomas v. Thomas* [1947] AC 484; *Tay Kheng Hong v. Heap Moh Steamship Co. Ltd.* [1964] 1 LNS 202; [1964] MLJ 87; *Powell v. Streatham Manor Nursing Home* [1935] AC 243; *Clarke v. Edinburgh Tramways Co* [1919] SC (HL) 35, 36.

[83] But we are not here concerned with any finding of fact which turned on the credibility of the witnesses. Here, we are only concerned with the effect in law of the first and second defendants' failure to disclose the material facts to the plaintiff, which as we mentioned is not in dispute. This court is therefore in the same position as the trial court and the Court of Appeal in determining the issue.

[84] As for the first and second defendants' contention that the issue of non-disclosure of material facts was not an agreed issue to be tried before the High Court, we note from the record that the first and second defendants themselves never pleaded the defence that the letter of disclaimer exonerated them of all liability and responsibility under the sale and purchase agreement.

[85] This line of defence was only raised for the first time at the High Court in the first and second defendants' written submissions dated 7 November 2010 where it was argued that the letter of disclaimer "clearly exempted the defendants from all liabilities or allegations of liabilities". It was only raised after all the evidence had been led by both parties. In short, it was pleading by evidence.

[86] This, according to learned counsel for the plaintiff, was the reason why the issue of non-disclosure of material facts was not incorporated in the agreed issues to be tried. In our view, the point was validly taken by the plaintiff. In the circumstances the first and second defendants' complaint that the issue of non-disclosure of material facts was not an agreed issue to be tried before the High Court is a non-issue.

[87] Having given anxious consideration to the matter, we are of the view that the first and second defendants' failure to disclose the two material facts to the plaintiff disentitled them from relying on the letter of disclaimer to absolve themselves of all liability and responsibility under the sale and purchase agreement.

[88] The fact that the plaintiff issued the letter of disclaimer voluntarily and with open eyes is of no consequence if material facts which affected or might have affected her decision to issue the letter of disclaimer were knowingly and deliberately withheld from her knowledge. For the court to countenance such action by the first and second defendants would be to condone their wrongful acts. They cannot be allowed to benefit from their own wrong. It will be totally inequitable and contrary to conscience to allow them to do so: *Letchemy Arumugam v. N Annamalay* [1982] 1 LNS 8; [1982] 2 MLJ 198; *Ong Ban Chai & Ors v. Seah Siang Mong* [1998] 3 CLJ 637; [1998] 3 MLJ 346.

[89] Such letter of disclaimer is void as the plaintiff was not made aware of the breaches by the first and second defendants when she terminated the retainer and promised to absolve the first and second defendants of their liability under the sale and purchase agreement.

[90] It is clear that the first and second defendants had acted contrary to their duty by failing to advise the plaintiff to seek independent legal advice before she issued the letter of disclaimer and to make full disclosure of all material facts known to them. It was therefore wrong for the learned trial judge to have allowed the first and second defendants to rely on the letter of disclaimer to avoid liability. In the upshot, our answer to the question posed for determination is in the affirmative.

Whether Defendants Liable

[91] The question that follows is whether, without the protection of the letter of disclaimer, the first and second defendants were liable in negligence to the plaintiff. The issue needs to be addressed as the learned trial judge had found, in the alternative, that even if the letter of disclaimer did not absolve the first and second defendants of liability and responsibility under the sale and purchase agreement, they had not been in breach of their duty of care to the plaintiff. In other words, they were not liable in any event, with or without the letter of disclaimer.

[92] In law it is for the court to adjudicate on what is the appropriate standard of care to be observed by a person with special skill or competence: *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 CLJ 229; [2007] 1 MLJ 593 FC. In *Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (1)* [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251; [1984] 2 MLJ 39, Syed Agil Barakbah FJ delivering the opinion of the Federal Court on a solicitor's liability in tort to his client said at p. 261 (CLJ); p. 45 (MLJ):

> The liability of a solicitor may be viewed in two aspects. At common law the retainer imposes upon him an obligation to be skilful and careful and for failure to fulfil this obligation he may be made liable in contract for negligence whether he is acting for reward or gratuitously. On the other hand, like any other individual, a solicitor is liable for his wrongful acts and if the circumstances justify the charge, he may be made liable to his client in tort. (See *Halsbury's Laws of England*, Third Edition Volume 36 page 96, paragraph 131).

He owes a duty not to injure his client by failing to do that which he had undertaken to do (*Midland Bank Trust Co Ltd (supra)*).

[93] In *Swamy v. Matthews & Anor* [1967] 1 LNS 174; [1968] 1 MLJ 138 FC, Barakbah LP said:

> Now on the law. A man or a woman who practises a profession is bound to exercise the care and skill of an ordinary competent practitioner in that profession – be it the profession of an accountant, a banker, a doctor, a solicitor or otherwise. In the case of *Lanphier Phipos* (1883) 8 Car & P 475; 173 ER 581 Tindal CJ laid down this principle:
>
> > Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest degree of skill. There may be persons who have higher education and greater advantages than he has; but he undertakes to bring a fair, reasonable and competent degree of skill.

[94] Being the solicitors acting for the plaintiff in the land transaction, the first and second defendants owed her a duty not to injure her by failing to do that which they had undertaken to do, which was to take all necessary steps to effect transfer of the land to her upon execution of the sale and purchase agreement.

[95] On the evidence, it is plain and obvious that the first defendant (and by extension the second defendant) failed to discharge that duty in a manner that was expected of a reasonably competent solicitor having regard to the standards normally adopted in the profession: See *Midland Bank Trust v. Hett, Stubbs & Kemp* [1978] 3 All ER 571.

[96] The first defendant did not even bother to check if the land title number that was written on the PA matched the land title number that was written on the document of title itself. It took the plaintiff, who paid him to do the job, to point out the mistake to him. This was a red flag that should have alerted the first defendant to the danger of acting on the PA without first ascertaining whether it was genuine and whether it was properly granted by the registered landowner. However, he brushed aside the mistake by telling the plaintiff that it was only a typing error. That was how careless the first defendant had been.

[97] It was also decided in the *Midland Bank Trust* case that the extent of the legal duty in any given situation is a question of law for the court to decide. Given the circumstances surrounding the land transaction and the purport of the letter of disclaimer, the first and second defendants' legal duty must extend to disclosing all material facts to the plaintiff which might have injured her at the time she issued the letter of disclaimer.

[98] By failing to disclose the two material facts to the plaintiff when the situation demanded disclosure, the first and second defendants were clearly in breach of their contractual and fiduciary duties to the plaintiff. It tantamount to misrepresentation by silence. They cannot now take cover behind the letter of disclaimer to avoid liability and responsibility if otherwise they had been in breach their duty of care to the plaintiff.

[99] Had the first defendant discharged his duty in a manner expected of a solicitor of seven years experience in conveyancing, the fraud, granting that he and the second defendant were not privy to it, would have been discovered before the sale and purchase agreement was executed and before the plaintiff paid any money towards payment of the purchase price.

Conclusion

[100] There is no doubt that the plaintiff's loss was caused directly by the first and second defendants' negligence. Without the letter of disclaimer as cover, their liability in negligence would have been established. It is clear that the plaintiff had discharged her burden of proving her claim against the first and second defendants on the balance of probabilities.

[101] In the circumstances, the appeal is allowed with costs. The decision of the Court of Appeal affirming the decision of the High Court finding the first and second defendants not liable to the plaintiff is set aside. The case is remitted to the High Court for assessment of damages by a judge of the High Court.